United States Court of Appeals

for the Second Circuit

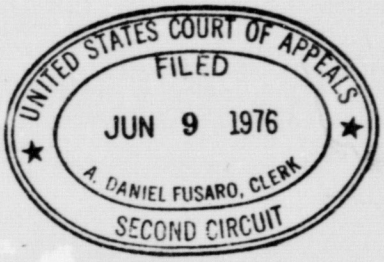
BRIEF FOR APPELLANT

B P/S (8cc)

76-1142

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

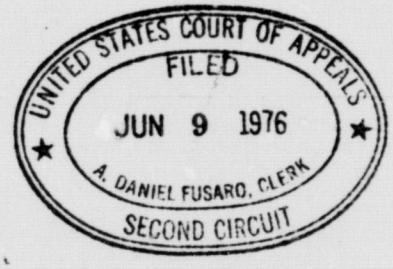
RALPH BROWN,

Defendant-Appellant.

Docket No. 76-1142

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
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BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the Judge's supplemental charge on entrapment was so defective as to preclude a fair evaluation of the defenses presented by appellant Brown, thereby depriving him of a fair trial.

2. Whether the Judge's charge on entrapment failed to instruct on the Government's burden of proof.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Irving Ben Cooper) entered on March 17, 1976, convicting appellant Ralph Brown of conspiracy to violate the Federal narcotics laws, and sentencing him to six months in custody and five years' probation.[1]

This Court continued[2] The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

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[1]The original sentence required 11 1/2 years' probation. However, the sentence was subsequently corrected.

[2]Under the new district court method of preparing docket sheets, entries for each defendant are made on separate sheets. The docket sheet prepared for appellant Brown incorrectly names Martin Ozer as his assigned counsel. Brown was represented at trial by The Legal Aid Society, Federal Defender Services Unit; Ozer was counsel to co-defendant Smith.

Statement of Facts

A. Introduction

The first count of the indictment[3] charged appellant Brown, Arthur John Smith, and others to the grand jury unknown, with conspiracy to violate the narcotics laws from January 1, 1975, to February 15, 1975. The overt acts charged in the indictment all related to a transfer of drugs on January 14, 1975. The second count of the indictment charged the substantive count of transferring narcotics on January 14, 1975. Prior to trial, Smith pleaded guilty to the conspiracy count.

During the course of the trial, Drug Enforcement Administration Agent Carliese Gordon testified to a sale of drugs on January 14, 1975, and to two subsequent meetings. In defense, appellant Brown asserted that he had been entrapped by the participating Government informer. In rebuttal, the Government called the informer, Morris Davis (or Johnson), to dispute the claim of entrapment.

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[3]The indictment is B to the separate appendix to appellant's brief.

B. The Trial

At the suggestion of a policeman friend, Morris Davis first contacted the Federal narcotics officials in 1971, seeking to become an informer (184[4]). Davis called at Foley Square and met with an agent (185). It was not until 1975, however, that Davis, as he stated, "set up" someone (184).

Davis wanted to become an informer to make money (186). After a buy, Davis was paid a lump sum of a few hundred dollars in cash (188, 189, 213). On one occasion he received $1,000 (199). Davis made five successful purchases, receiving about $3,600 in payment (218).

Davis' record included four arrests after becoming an informer for the Government (186, 205), and three prior to his becoming an informer (205). In 1974 he pleaded guilty in the United States District Court for the Eastern District of New York to interstate transportation of stolen property in a case arising in Baltimore in 1970 (206). Davis was sentenced to a term of probation, but subsequently was found in violation of probation for possession of a stolen credit card (207). As a result of that violation, he spent some time in custody (208). A Federal agent sent a letter to the District Court to assist Davis in the probation violation proceeding (209).

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[4]Numerals in parentheses refer to pages of the transcript of the trial.

It was undisputed that Davis and Brown had known each other for 20 years (Davis at 149; Brown at 89), that they knew members of each other's families (Davis at 149), and that they referred to each other as cousins (Brown at 89).

It was also undisputed that appellant Brown lived and worked in Atlantic City, New Jersey,[5] beginning in the mid-1960's, after growing up in New York. Appellant was a self-employed taxi driver, working 12 to 14 hours a day to support his wife and seven children, aged from three weeks to 18 years (87-88). Brown explain that in the early 1960's he had used drugs, but had stopped doing so in 1964 (88).

In January 1975 Brown came to New York to help a friend whose house had burned (90).

On January 13 or 14, 1975, Davis spoke with Brown's son, Roy, obtaining from Roy a telephone number (150) at which he called appellant (151).

At this point, the testimony given by Davis and Brown differs substantially.

Brown testified that the substance of the telephone call from Davis was an urging by Davis that Brown do him a favor and get him a "package." Brown understood this to mean drugs and protested, saying that he had gotten away from drugs and didn't want to get involved (91-92). Davis said if Brown could get him a package, Davis would get

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[5]Atlantic City was the place of Brown's arrest some nine months after the events charged in the indictment (106).

enough money to invest in a bar. Brown again protested, but Davis continued his plea, saying that his ability to invest in the bar would get him out of the drug business (93). Brown continued to refuse Davis' importunings (93).

The next day Davis called again. The conversation was on the same subject as the previous day's had been, but this time Davis asked Brown to meet a friend of his. This friend, said Davis, was to be a partner of his in a bar. Brown then agreed to meet Davis and his friend at a nearby bar (94).

Davis and Brown met at the bar where Davis introduced Brown to undercover DEA Agent Gordon as his friend and partner in the bar business (96).

Gordon and Davis urged Brown to supply them with one package, and promised not to come back for any more (96, 97-98).

Brown finally agreed to help them, doing so only because of his 20-year long friendship with Davis (98).

Davis, on the other hand, testified that he asked Brown to get him some drugs and Brown replied that he would see what he could do. Brown took Davis' telephone number and called him back in 20 minutes (152). During the return call Brown told Davis that he had an ounce for $1,400 that would take a "five cut" (153).

According to Davis, after Brown called Davis back, Davis called Agent Gordon and again telephoned Brown to set up the meeting (155). It must be noted that Davis acknowledged tell-

ing Brown that he needed the money for the purpose of investing in a bar (200; see 221).

The meeting Davis arranged took place on January 14, 1975, at 6:30 p.m. Davis introduced Brown and co-defendant Smith to undercover agent Gordon in Davis' car, a Cadillac (Gordon at 22, 26, 27). According to Brown,[6] he asked them while still in the car not to involve him in any drug transaction (119). However, on being urged, appellant Brown relented and Davis drove to meet a friend of Brown's. Brown left the car and returned shortly to say that the man wanted $1,400 in advance (160).[7]

Agent Gordon said he had to leave the car to make a telephone call (37). Both Davis and Brown testified that Gordon said the call was to his wife, since the money was hers (99-100, 163). Gordon refused to make the advance payment.

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[6]Brown testified that Smith was not a party to the transaction (117). Davis, but not Gordon, testified that Brown introduced co-defendant Smith as his partner (159).

[7]There is conflict in the testimony as to whether Brown tried to convince Gordon and Davis to make the advance payment. Both Gordon and Davis said that Brown remarked that he would not steal $1,400, but that if he were going to steal he would wait for a larger amount to be involved (38, 160). Brown denied this (123). However, Davis acknowledged that Brown said he was becoming involved only because of Davis (160).

Brown left the car and returned to instruct Davis to drive to another location (38, 101, 163) where the transfer took place (40-41). The package involved contained heroin.

Agent Gordon testified that he told Brown he would return in three or four days for more and that Brown said he could handle up to a kilogram (41).

The following day, Gordon and Davis, unplanned, met Brown and co-defendant Smith, complaining that the package was short (47, 103). Brown testified that he realized that Gordon and Davis were back for more drugs, although they had promised they would make no further requests (103). Therefore, Brown testified, he decided to pretend to help them, although he had no intention of doing so (105).

Agent Gordon acknowledged that on a later date, January 23, 1975 (48), appellant Brown was unable, on two occasions, to obtain the drugs Gordon had requested (51-53).

C. The Informer as a Witness

During the trial, Judge Cooper requested that the U.S. Attorney produce Davis in court (see 284). Although Davis continued to see the agents during the period the trial was in progress, Davis testified that the agents never told him he was wanted in court (179), and during the trial the Assistant U.S. Attorney falsely represented to the court that the Government was having difficulty locating Davis (282).

Finally, on Saturday, March 30, 1976, appellant Brown,

with two New York City policemen and a friend named Randy Hines, served a subpoena on Davis (134-136).[8] Appellant Brown testified that Davis said he would talk to Agent Gordon about getting leniency for Brown if Brown would withdraw the subpoena. Davis was concerned about having his probation revoked (143). According to appellant, Davis admitted committing two homicides (144).

According to Davis, Brown asked whether Davis could help him (172), and Davis acknowledged telling appellant he would try to do what he could with the agents (176).

Randy Hines, who helped serve the subpoena on Davis, was an addiction counselor at Harlem Hospital and a student at Queens College. He testified that he heard the second conversation between Brown and Davis. Hines heard Davis say that he would speak to someone on behalf of Brown, that Davis told "them" that Brown did not want to do it, and that Davis "had enough information that they would have to go along with him in doing something for Ralph." Davis was also overheard saying that he had killed two persons and they had a lot on him (233).

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[8]In his summation the Assistant U.S. Attorney argued that the Government had produced the informer. Defense counsel properly objected to the statement as false (281), but Judge Cooper declined to compel a correction (286).

D. The Court's Charge to the Jury[9]

At the conclusion of the trial, defense counsel requested an instruction to the jury on entrapment.[10] In his request, defense counsel asked that the jurors be told that the Government had the burden of proving predisposition beyond a reasonable doubt. Judge Cooper agreed to give that portion of the request (244).

Nevertheless, in his charge on entrapment (352-356), the District Judge nowhere told the jurors that the Government had to prove predisposition beyond a reasonable doubt. Even in the portion of the charge dealing with burden of proof, he said only:

> Now, as to the burden of proof on the issue of entrapment. If you should find there is some evidence of inducement, then the Government has the burden of proving that such inducement was not the cause or creator of the crime. In other words, the Government must prove that this defendant was ready and willing to commit the offense charged. Have I made that clear? I have repeated it backwards and forwards, the same idea, but it is important that you get it. Again, I say I am encouraged by the nodding of your heads spontaneously and that satisfies me that I need not dwell on entrapment further.
>
> (356).

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[9]The complete charge is C to the separate appendix to appellant's brief.

[10]The full request to charge is D to the separate appendix to appellant's brief.

During the course of deliberations the jury returned with a note which read:

> Is entrapment a defense for conspiracy? I.e., if we feel there was entrapment, does it necessarily follow that we must acquit on conspiracy since no partnership would have been formed were it not for this "deal".
>
> Are these charges completely separate?
>
> deal=initial conversation between Morris and Brown

In the ensuing colloquy,[11] the Assistant U.S. Attorney asked for a re-reading of the instruction on entrapment. He stated that an acquittal on the substantive count did not require an acquittal on the conspiracy count, because the conspiracy count contained more than the January 14 transfer. Defense counsel requested that the Judge answer "yes" to the question whether entrapment applies to conspiracy requested that the jurors be told they could consider a new theory of the case and that the Judge give his entrapment charge again, since that charge had been agreed to; and requested that the Judge answer "yes" as to whether the charges were separate (381, 382-383).

The Judge believed the problem was whether appellant Brown had admitted participating in the conspiracy and that the jury had to find such an admission before applying the entrapment defense to the conspiracy. He then gave the following charge:

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[11] The full colloquy is annexed as part of C to the separate appendix to appellant's brief at 371-392.

You undoubtedly got the general impression from my charge as to entrapment that it is a defense raised where a person charged with a crime says in effect, yes, I did do all those steps that spell out the doing of a crime but I want you to know that I want to add the defense of entrapment.

Hence, it is that when the defendant went on the stand you heard his testimony, you heard what he admitted and what he denied. There seems to be some disagreement between us as to whether or not the defendant admitted the conspiracy. It is clear that he admitted the second count.

If you conclude that he admitted the conspiracy, then you apply the defense of entrapment, because you don't apply entrapment if a man denies he did something, only when he admits he did it.

Do you get the point?

JUROR NO. 9: I do, sir.

THE COURT: Here is the language of the law.

A defendant's testimony to the effect that he did not commit the crime cannot raise an issue of entrapment. That is the law I am charging you. I repeat it again:

A defendant's claim to the effect that he did not commit the crime cannot raise an issue of entrapment.

Have you got that? Anybody fail to get it?

Now, suppose you conclude that he did admit the conspiracy or conspired. Then you apply the defense of entrapment the way you applied it in the second count on which we are all agreed that he did admit doing or committing that substantive act charged in Count 2. But he says I admit it happened but I was entrapped.

Don't you see, in essence entrapment can be considered by you as a defense to each count separately?

Suppose, for example, you decide that he did admit in essence that he admitted the conspiracy. Then he is entitled to the defense of entrapment, right? Am I getting through to you so far?

You take the whole trial record, everything that happened before you, the stipulations, the exhibits, everything else, and you decide on Count 1 did the Government establish the charge in Count 1, the conspiracy, beyond a reasonable doubt?

Did the defendant admit what you are convinced of, that he did conspire, that the charge has been sustained in Count 1?

Well, you apply the defense of entrapment and are you satisfied from the totality of the evidence that he was entrapped? And if you are satisfied, out, he is acquitted of Count 1.

Then you pick up Count 2 and you ask yourselves what about this? The Judge told us what elements must be established, each of which must be established beyond a reasonable doubt as to Count 2.

Are we satisfied beyond a reasonable doubt as to each one of thoese elements that must be proven in Count 2?

Suppose you decide that you are satisfied beyond a reasonable doubt, you don't have to ask yourselves whether or not he admitted Count 2, because we are all agreed that he did. You may be equally convinced with regard to Count 1.

But in considering Count 2 now, it is another case, another deal, another proposition, another separate act. It is another matter that you can consider using the same evidence, of course.

So you pick up that whole record again and pick up all the stipulations again and pick up everything in the total record again, including the Judge's charge and, you say, am I convinced beyond a reasonable doubt that he committed Count 2?

> Suppose you say yes? Then you go to the question, what about entrapment? If you are convinced that the defendant was entrapped with regard to Count 2, out goes the case.
>
> If you are not convinced, then you disregard what he asserts as to entrapment as to Count 2.
>
> You may, for instance, find entrapment as to one count and not as to the other. Do you understand that?
>
> You look, some of you look and it makes me feel that you do understand and some others are making faces, I can't tell. So I am going to call on each one of you. If it isn't that clear, you demand from the Judge that he make it clear.
>
> I think that was the indication of what I said to you at the closing hours yesterday, that the two cases are separate, two separate charges. He can be guilty of neither one, found guilty of both, he can be found guilty of one and acquitted on the other.
>
> (392-396).

Counsel objected to the charge (400).

After further deliberations, the jury returned to convict appellant Brown of the conspiracy count and acquit him on the substantive count.

ARGUMENT

Point I

THE JUDGE'S SUPPLEMENTAL CHARGE ON ENTRAPMENT WAS SO DEFECTIVE AS TO PRECLUDE A FAIR EVALUATION OF THE DEFENSES PRESENTED BY APPELLANT BROWN, THEREBY DEPRIVING HIM OF A FAIR TRIAL.

During the course of their deliberations, the jurors returned with a three-part inquiry. They asked if the entrapment defense applied to conspiracy, and then said:

> Is entrapment a defense for conspiracy? I.e., if we feel there was entrapment, does it necessarily follow that we must acquit on conspiracy since no partnership would have been formed were it not for this "deal".
>
> deal=initial conversation between Morris and Brown

They then asked if the two counts were separate.

Both defense counsel and the Assistant U.S. Attorney expressed their beliefs that the jurors were confused about the entrapment defense and asked that the instruction on that defense be repeated (374-375, 383). Defense counsel urged that to the extent that the January 14 transaction was the conspiracy, the entrapment defense applied to both counts (380-381).[12]

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[12]The Government was concerned that the jurors confused mere inducement with entrapment.

The District Judge refused to reiterate his entrapment charge. He was concerned that entrapment applied to only an admitted crime and that appellant Brown had denied the conspiracy here. The Judge stated to the jurors only that they had to find that appellant Brown admitted participation in the conspiracy and that they could then apply the entrapment defense to the conspiracy count.

Defense counsel objected to the supplementary charge both before and after it was given. On the facts of this case, the supplementary charge given was wrong, and defense counsel was correct in asking that the original entrapment charge be repeated.

Defense counsel viewed the conspiracy count as consisting of the January 14 sale, which was also the substantive count (380-381). Indeed, the only overt acts charged in the indictment related to January 14. Thus, his view was that an acquittal on the substantive count based on entrapment required an acquittal on the conspiracy count if it was based on the January 14 sale. The Government, on the other hand, viewed the January 14 sale, as well as the later meetings, as part of the conspiracy, so that the later meetings could produce a conviction on the conspiracy count (376-377). Thus, the Assistant U.S. Attorney concluded that an acquittal on the substantive count based on entrapment did not require a like result on the conspiracy.

The record shows that both defense counsel's analysis

and the Government's analysis were correct, and that the supplementary charge failed to recognize the complex nature of the question and the need to work through the theories of the case for the jurors. Appellant Brown claimed the defense of entrapment only as to the January 14 meeting. The defense of lack of intent to agree was presented with respect to the later incidents alleged to be part of the conspiracy. Thus, as defense counsel urged, appellant Brown was entitled to a charge on entrapment with respect to the January 14 transaction and an instruction that the jurors could not consider that transaction in finding a conspiracy if they found that Brown was entrapped into participating in that transfer.

In the event the jurors found that Brown was entrapped, they had then to evaluate the defense of lack of intent.

On these facts, Judge Cooper's instruction that appellant Brown had to admit his participation in the conspiracy in order to avail himself of the entrapment defense was misleading. This is so because the charge implied that the defense of entrapment was not available with respect to the January 14 transaction unless Brown admitted the entire conspiracy as charged. Since appellant denied participation in events after January 14, 1975,[13] under the Judge's instruc-

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[13]Judge Cooper apparently believed that appellant Brown denied participation in any agreement on January 14 because he testified that co-defendant Smith was not involved. However, by admitting that he obtained the drugs for the agent, appellant Brown of necessity acknowledged participation of

tion the defense appeared not to be available to any portion of the alleged conspiracy. This is so because the jurors were told they had to find that appellant Brown admitted participation in the entire conspiracy.

Under this instruction the jurors could not find both that entrapment precluded a conviction based on the January 14 events and that lack of intent precluded a finding of guilt based on the later meetings.

Counsel was correct in objecting to the supplementary charge as given and to the Judge's refusal to repeat the charge on the entrapment defense. The charge as given denied appellant Brown his right to have the jury fairly evaluate his defenses and determine his guilt. Accordingly, the judgment must be reversed.

(Footnote continued from the preceding page)

the party who was the source of the drugs. Since the indictment charged that co-conspirators were both Smith and "others unknown," the undisclosed sourse satisfies the requirement that appellant admit an agreement.

Point II

THE JUDGE'S CHARGE ON ENTRAPMENT FAILED TO INSTRUCT ON THE GOVERNMENT'S BURDEN OF PROOF.

In accord with the proof in this case, defense counsel presented to the District Court a proposed instruction on entrapment which included a request that the jurors be told that the Government must prove propensity beyond a reasonable coubt. Judge Cooper stated that he would include such an instruction in his charge. However, he failed to do so.

It is now clear in this Circuit that a proper charge on entrapment includes the statement that if the defendant produces some evidence of inducement, the Government must then come forward to prove beyond a reasonable doubt that the defendant was ready and willing to commit the crime. United States v. Braver, 450 F.2d 799, 805 (2d Cir. 1971), cert. denied, 405 U.S. 1064 (1972); United States v. Berger, 433 F.2d 680, 684 (2d Cir. 1970), cert. denied, 401 U.S. 962 (1971).

Here, the significance of the entrapment defense cannot be disputed. First, the jury acquitted on the substantive count, and the jurors' note indicates that verdict was due to an acceptance of the entrapment defense. The evidence of predisposition came through Government witnesses, and consisted only of their testimony of lack of reluctance. There was no evidence of an existing course of conduct or an already

formed design. See United States v. Anglada, 524 F.2d 296, 298-299 (2d Cir. 1975). The key Government witness was an informer who admitted he was paid for his information only after a buy and acknowledged that he told appellant Brown he needed money. The circumstances were perfect for an inducement without propensity, given the long relationship between appellant and the informer.

The testimony on propensity was countered by the very credible appellant who carefully elaborated his attempts to stay out of the narcotics transaction. The credibility issue raised here was one appropriate for the jurors on a proper instruction. United States v. Riley, 363 F.2d 955, 958 (2d Cir. 1966).

The error in the charge here is not diminished by the fact that the jurors could find guilt of the conspiracy count on alternative theories (see Point I, supra). If the jurors believed that appellant Brown had not participated in the conspiracy by way of the later two meetings, neither of which resulted in a transfer of drugs, the erroneous instruction here might have nonetheless produced a conviction on the conspiracy count.

Despite his request to charge, defense counsel did not object to the omission in the instruction. This, however, should not preclude reversal on this count. Clearly, no waiver was intended, since counsel wanted the charge. There was general agreement that the charge was proper, and it appears

that counsel, confident that the Judge would do as he promised, might not have been aware that it was omitted.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the case remanded for a new trial.

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CERTIFICATE OF SERVICE

June 8, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Ruth Gilbert Bamberger